

FEDERAL CIRCUIT COURT OF AUSTRALIA

ZHANG v MINISTER FOR IMMIGRATION & ANOR [2018] FCCA 3465

Catchwords:

MIGRATION – Partner visa – applicant enters Australia as student – applicant meets sponsor in May 2011 – 27 year age difference – applicant marries sponsor in February 2012 – applies for partner visa – Delegate refuses application – not satisfied genuine and continuing relationship as required under ss 5F(2)(c) and 5CB(b) of the *Migration Act 1958* (Cth) – Tribunal affirms Delegate’s decision – application for judicial review – whether Tribunal considered all of the parties’ circumstances – Tribunal did not disregard fact of the parties’ relations – matter for Tribunal to determine weight it attributes to these issues – Tribunal considered mandatory considerations prescribed by reg 1.15A(3) of *Migration Regulations 1994* – Non-Disclosure Certificate – applicant suffered no disadvantage by reason of non-disclosure – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5CB, 5F, 57, 65, 359A, 360, 360A, 376, 375A
Migration Regulations 1994 (Cth), cl 801.221, reg.1.15A

Cases cited:

DAO16 v Minister for Immigration and Border Protection (2018) 353 ALR 641
DDN16 v Minister for Immigration and Border Protection [2018] FCA 1697
He v Minister for Immigration and Border Protection [2017] FCAFC 206
Lo v Chief Commissioner of State Revenue (2013) 85 NSWLR 86
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration and Border Protection v CQZ15 [2017] FCAFC 194
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
Minister for Immigration v SZMDS (2010) 240 CLR 611
Project Blue Sky v Australian Broadcasting Authority 194 CLR 355
Um v Minister for Immigration [2005] FMCA 1590

Applicant: YING ZHANG

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: MLG 1468 of 2016
Judgment of: Judge A Kelly
Hearing date: 26 November 2018
Date of Last Submission: 26 November 2018
Delivered at: Melbourne
Delivered on: 27 November 2018

REPRESENTATION

The Applicant: In person
Counsel for the Respondents: Mr Yuile
Solicitors for the Respondents: Clayton Utz

ORDERS

- (1) The application filed on 11 July 2016 be dismissed.
- (2) The applicant pay the costs of the first respondent fixed at \$7,328.
- (3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 1468 of 2016

YING ZHANG

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By application filed on 11 July 2016, judicial review is sought of a decision of the Administrative Appeals Tribunal (***Tribunal***) made on 17 June 2016 affirming a decision of a delegate of the first respondent (***Minister***) not to grant the applicant a Partner (Residence) (Class BS) visa pursuant to s 65(1)(a) of the *Migration Act 1958* (Cth) (***Act***).

Background

2. The applicant, a Chinese national aged 34 years, first entered Australia in 2005 on a student visa. She was subsequently granted a further number of student visas.

3. On 31 October 2012, the applicant applied for a partner visa, doing so on the basis of her relationship with Michael Weklak (**sponsor**). The applicant claimed to have met the sponsor at a friend's house warming party in May 2011. The applicant further claimed that she and her sponsor began cohabiting in January 2012, and were married on 18 February 2012. Whether it be of any moment, there is an age differential between the applicant and sponsor of 27 years.
4. On 20 March 2014, the applicant emailed the Department requesting an update on the status of her visa application.
5. On 28 March 2014, the Department emailed the applicant requesting a copy of a valid police clearance from China. On 2 April 2014, the applicant provided the Department with a certified copy of a Chinese police clearance certificate dated 14 July 2004.
6. By letter dated 19 May 2014, the Department requested further information from the applicant including evidence of her relationship with the sponsor.
7. On 15 June 2014, the applicant provided the Department with copies of the applicant's and sponsor's Certificate of Marriage, bank statements, and photographs of herself with the sponsor.
8. On 1 July 2014, the applicant was granted a Partner (Temporary) (class UK) Partner (subclass 820) visa.
9. On 30 October 2014, the applicant applied for a Partner (Residence) (class BS) Partner (subclass 801) visa.
10. By letter dated 2 February 2015, the Department acknowledged the applicant's application and requested further information, including a statutory declaration from the sponsor.
11. On 27 February 2015, the applicant provided the Department with a number of documents including a statutory declaration from the sponsor outlining his relationship with the applicant and the nature of their household.
12. On 24 March 2015, the Department received information from a third party regarding the nature of the relationship between the applicant and

sponsor. The information so received became the subject to a Non-Disclosure Certificate given under s 376 of the Act.

13. By letter dated 30 March 2015, the Department invited the applicant in accordance with s 57 of the Act to comment on information it received which suggested that the applicant had provided false or misleading information in a telephone interview conducted on 30 March 2015 between a Departmental officer and the applicant and sponsor. The letter detailed the answers which had been given by the applicant and her sponsor and invited her to comment on the veracity of those answers.
14. On 3 April 2015, the applicant emailed the Department giving reasons for discrepancies in the applicant's and sponsor's answers during the 30 March 2015 interview, and noted that neither the applicant nor her sponsor had been "expecting such a probing interview". She further explained that the interview had occurred on the day that the parties had attended the funeral of the sponsor's godmother.
15. On 15 April 2015, the Department notified the applicant that her application for a partner visa had been refused. A delegate of the Minister refused the application as she was not satisfied the applicant and sponsor lived together as required under ss 5F(2)(d) and 5F(2)(c) of the Act. The delegate was also not satisfied that the applicant and sponsor were in a genuine and continuing relationship as required under ss 5F(2)(c) and 5CB(b) of the Act. Not being satisfied that the applicant met the criteria for a partner visa as specified in cl 801.221 of the *Migration Regulations 1994* (Cth) (**Regulations**), the delegate made a decision to refuse the application.
16. On 1 May 2015, the applicant applied to the Tribunal for review of the delegate's decision. The application listed VSTAR Immigration and Education Services as the applicant's representative.
17. On 12 May 2015, a delegate of the Minister issued a certificate under s 376 of the Act notifying the Tribunal that the information contained in folio of 116 of the Departmental file was subject to s 376 and applied to both the documents and information contained in that folio.

18. On 11 May 2016, the Tribunal invited the applicant to attend a hearing on 27 May 2016 to give evidence and present arguments relating to the decision under review.
19. On 27 May 2016, the applicant appeared before a Tribunal comprised of two members, and did so with the assistance of her representative. The applicant provided the Tribunal with a number of documents relating to the nature of the relationship between her and the sponsor.
20. On 17 June 2016, the Tribunal notified the applicant of its decision. In a written statement of reasons (**Reasons**), the Tribunal affirmed the delegate's decision not to grant the applicant a partner visa.

Tribunal's reasons

21. The Reasons were not extensive.
22. In its consideration of the application, the Tribunal recorded the applicant's history including that she had been granted a number of student visas, met her sponsor in May 2011, moved in together in January 2012, married in February 2012 and then ceased her studies and had not worked since: [10].
23. The Tribunal was satisfied that the applicant and sponsor were validly married in Melbourne on 18 February 2012 and so met the requirements of s 5F(2)(a) of the Act: [9].
24. The Tribunal proceeded to consider the nature of the parties' commitment. The Tribunal noted that the substantial age difference between the applicant and sponsor was not in itself an indication the relationship was not genuine: [10].
25. The Tribunal stated that it would be expected that the parties would discuss the fact of the difference in their age and be cognizant of its potential impact on their future plans: [10]. The Tribunal was not satisfied that the applicant and sponsor had planned a future together as spouses or that they saw their relationship as a long-term and exclusive one. It examined the documents supplied in relation to certain travel arrangements which had occurred in the week before the parties' marriage and subsequently noting that only the applicant was named in some of those travel documents. It accepted that the sponsor might

have been preoccupied with work and cost conscious but viewed the parties' relationship as indicating that they lived quite separate lives: [10]-[13].

26. In addressing the social aspects of the parties' relationship, the applicant and sponsor had provided the Tribunal with photographs of themselves in various social settings. Although the Tribunal accepted that they had interacted socially, it did not accept the photographs in themselves were indicative of their social interaction as spouses: [14]. It took into account the statutory declarations provided in support of the application but noted that more detailed statements or evidence had not been provided by friends or family members of the applicant or her spouse: [15]-[16].
27. The Tribunal also considered it significant that none of the sponsor's family members had attended their wedding, albeit that they had attended a gathering both before and after the ceremony: [16]. Furthermore, the sponsor gave evidence that he had only met the applicant's father once: [17]. The Tribunal considered that the parties had given generalised but consistent evidence about their social activities and household affairs: [18], [24]. It was not satisfied that the applicant and her sponsor presented socially as a couple or that they were recognised by family, friends or acquaintances as such: [19].
28. Turning to the nature of the parties' household, the Tribunal considered the evidence supplied by the applicant cast doubt on whether they had shared a household since early 2012. It found that the sponsor was not a party to the rental agreement for an apartment in the city because the sponsor's name had been added in handwriting to one part, but not to other parts such as the bond details: [20]. The Tribunal concluded that the applicant was living permanently in the Melbourne apartment, and not in the sponsor's Keysborough home, therefore they were not sharing a household in a manner consistent with a spousal relationship: [21]. The Tribunal rejected as not credible the evidence of a series of addresses including postal addresses provided by the applicant: [22]. The Tribunal considered it unusual, that after having been married for three years, the applicant had nominated a person with whom she had studied as her point of emergency contact: [23]. It took account of but attached little weight to other documents supplied: [25]. The Tribunal

was not satisfied that the parties shared a household in a manner consistent with their being spouses: [26].

29. In relation to the financial aspects of their relationship, the applicant gave evidence that she was financially supported by her father in China: [27]. Her sponsor also provides more limited financial assistance: [27]. The Tribunal also noted that the sponsor had not included the applicant's name as joint owner of the Keysborough property, neither had he made a will nor named the applicant as the beneficiary of his insurance or superannuation entitlements: [28]-[29]. His evidence was considered to be vague and unconvincing on these issues.
30. The applicant presented inconsistent evidence about whether she purchased the deposit for an off-the-plan property in Parkville with joint account funds or with funds from her father. The Tribunal found the applicant's evidence in relation to this property as evasive: [30]. Her statement that the monies required for the deposit had been obtained from her father was inconsistent with her representative's submissions and her written statement that the monies had been obtained from the joint funds of the applicant and her sponsor: [30]. It was then said that the property was registered in the name of her sponsor: [31].
31. On the evidence before it, the Tribunal found that the applicant's and sponsor's finances were barely intermingled, and that the applicant was financially supported by her father rather than the sponsor: [32]-[33].
32. The Tribunal undertook an overall assessment of the application and noted that, although there was evidence before it that supported the claim that the applicant and sponsor were in a spousal relationship, such evidence was to be weighed against other information before it: [34].
33. The Tribunal was not satisfied that the applicant's and sponsor's evidence was cogent enough to support the claim that they were in a genuine relationship. The Tribunal was not satisfied that the applicant and sponsor could satisfy cl 801.221(2)(c) because they could not demonstrate they had a mutual commitment to a shared life as husband and wife to the exclusion of all others or that the relationship between

them was genuine and continuing. It was not satisfied in all the circumstances that the parties were in a genuine spousal relationship. As the Tribunal was not satisfied that the applicant satisfied the criteria for the Partner visa, it affirmed the Delegate's decision: [35]-[39].

Procedural history

34. On 11 July 2016, the applicant filed an application for judicial review of the Tribunal's decision. The applicant sought orders that the Tribunal's decision be quashed, and a writ of mandamus be directed to the Tribunal requiring it to determine the applicant's application according to law.
35. The applicant swore an affidavit on 11 July 2016 exhibiting the Delegate's decision record and the Tribunal's Statement of Decisions and Reasons.
36. By Response filed on 22 July 2016, the Minister opposed the making of the orders sought on the basis that the Tribunal's decision was not affected by jurisdictional error.
37. The matter was listed for directions hearing on 20 December 2016. On that date orders were made, by consent, listing the matter for Final Hearing. Further orders were made regulating the filing by the applicant of any amended application, affidavits and written submissions.
38. An affidavit was filed on behalf of the Minister on 31 October 2018. The affidavit, which was made on 30 October 2018, exhibited the document which was the subject to the Non-Disclosure Certificate. The affidavit deposed as to the history of events giving rise to the receipt of the Certificate, the waiver of any claim withholding disclosure by reason of confidentiality, privilege or public interest immunity.
39. The affidavit, together with exhibits, was served on the applicant's solicitors some weeks before the hearing.
40. Until the morning of the hearing, the applicant had not taken the opportunity to file further material. On that date she filed a notice of address for service together with an affidavit. From her notice, it was

apparent that the applicant was self-represented. From her affidavit it was plain that the affidavit had been affirmed before the lawyer who had previously represented her. The affidavit had been sworn on the business day immediately prior to the hearing. The lawyer had not sought or obtained leave to withdraw from the proceeding prior to the date appointed for the hearing.

41. On 12 November 2018, the Minister filed written submissions which were responsive to the matters contained in the application.

Applicable principles

42. To qualify for the grant of a Partner visa, the applicant was required to satisfy the criteria in cl 801.221 of Sch 2 to the *Migration Regulations 1994*. In particular, the applicant was required to be the ‘spouse’ of her sponsor: cl 801.221(2)(c). For the purposes of the Act, the expression spouse has the meaning given by s 5F: see definition of spouse in s 5.
43. Section 5F defines the term Spouse, for the purposes of the Act:

Spouse

- (1) *For the purposes of this Act, a person is the **spouse** of another person (whether of the same sex or a different sex) if, under [subsection](#) (2), the 2 persons are in a married relationship.*
- (2) *For the purposes of [subsection](#) (1), persons are in a **married relationship** if:*
- (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
 - (b) *they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and*
 - (c) *the relationship between them is genuine and continuing; and*
 - (d) *they:*
 - (i) *live together; or*
 - (ii) *do not live separately and apart on a permanent basis.*
- (3) *The regulations may make provision in relation to the determination of whether one or more of the conditions in [paragraphs](#) (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.*

44. As contemplated by sub-s 5F(3), the Regulations make provision respecting the existence of conditions under para's (2)(a)-(d).
45. Regulation 1.15A which concerns the topic, *Spouse*, provides by r 1.15A(1) that that regulation sets out the arrangements for the purposes of determining whether 1 or more of the conditions in para's 5F(2)(a)-(d) exist. Regulation 1.15A(2) prescribes that the Minister must consider all of the circumstances of the subject relationship, including the matters set out in sub-reg (3).
46. The application contained three grounds of review.

Ground 1 – failure to consider

47. Ground 1 reads:

By failing to consider the degree of companionship and emotional support that the Applicant and her sponsor, Mr Michael Weklak, drew from each other as required by 1.15A(3)(d)(iii) of the Migration Regulations 1994 (Cth) (Regulations), the Administrative Appeals Tribunal (AAT):

- a. *constructively failed to exercise its jurisdiction when considering whether the Applicant is the spouse of her sponsor; and/or*
- b. *failed to take into account a relevant consideration, which it was bound to take into account, when considering whether the Applicant is the spouse of her sponsor.*

48. Particulars

- 1.1 *Reg 5F(3) of the Regulations provides that the Regulations may make provision in relation to the determination of whether one or more of the conditions in reg 5F(2) exist.*
- 1.2 *Reg 1.15A(2) of the Regulations provides that the Minister “must” consider all the circumstances of the relationship including the matters set out in sub-reg(3).*
- 1.3 *Reg 1.15A(3)(d)(iii) requires the Minister to have regard to “the degree of companionship and emotional support that the persons draw from each other”.*
- 1.4 *At the AAT hearing, the Applicant and her sponsor gave evidence that they had sexual activity, and the Applicant gave evidence that the sexual activity commenced in January 2011.*
- 1.5 *The AAT did not consider and/or failed to take into account the sexual activity between the Applicant and her sponsor.*
- 1.6 *The AAT did not consider and/or failed to take into account the matter required by Reg1.15A(3)(d)(iii).*

49. It is to be recalled that the applicant had been represented throughout the administrative decision making process and had attended the hearing before the Tribunal with her representative. The applicant presented as an articulate and intelligent person who rarely had recourse to the interpreter who attended to assist at the hearing before me.
50. The applicant's affidavit filed on the morning of the hearing exhibited an extract of the transcript of the hearing before the Tribunal which was relied upon to prove that evidence had been given as to the parties' sexual relationship. The evidence was tendered without objection and the Minister accepted it was an accurate transcription.
51. The exhibited transcript was confined to four questions in which the applicant gave evidence that she was currently using contraception, being in the form of condoms and planned to have children.
52. The applicant complained that the Tribunal has wrongly ascribed too much weight to the age differential of the parties and failed to expressly address the fact of their sexual relations. She complained that the Tribunal had failed to consider all of the parties circumstances as required by reg 1.15A(2)-(3).
53. The applicant's written submissions accepted that the Tribunal had considered the parties expressed plans for the future but complained that this did not adequately address the parties' sexual relations.
54. An administrative decision may be vitiated by legal error where a decision-maker failed to take into account a mandatory relevant consideration.¹ The identification of such matters is to be determined by reference to the subject matter, scope and purpose of the relevant legislation. In *Lo v Chief Commissioner of State Revenue*,² in which Basten JA, (with whom Beazley P agreed) said:³

55. *The term "relevant considerations" is widely misunderstood: as used in leading authorities, such as [Minister for Aboriginal Affairs v Peko-Wallsend Ltd](#),⁴ it refers to a matter which the*

¹*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39 (Mason J).

²(2013) 85 NSWLR 86.

³(2013) 85 NSWLR 86, [9].

⁴[1986] HCA 40; (1986) 162 CLR 24 at 39 (Mason J).

decision-maker is bound to take into account. The obligation may derive from the express terms of the power-conferring statute or may be implied from its subject matter, scope and purpose. A preferable term would be “mandatory consideration”. Further, a matter traditionally described as an “irrelevant consideration” is one which is prohibited because, having regard to the subject matter, scope and purpose of the power being exercised, it can be seen to reflect an extraneous or improper purpose or to render the decision arbitrary or capricious. Between these two categories is usually a wide range of permissible considerations which the decision-maker may weigh or disregard without committing an error of law.

56. Macfarlan JA, (with whom Beazley P also agreed) said:⁵

57. . . . in judicial review proceedings the omission of a decision-maker acting under a statute to take into account a relevant factor is only regarded as vitiating the decision if the statute, expressly or impliedly, mandates that that factor must be taken into account and indicates that failure to do so is intended to invalidate the decision (Peko⁶; Project Blue Sky v Australian Broadcasting Authority⁷). Likewise in appeals on questions of law, no relevant error of this type will be established unless it is at least shown that the decision-maker failed to take into account a matter that the statute required him or her to take into account. If that is shown, the decision-maker will have erred in law in expressly or impliedly misconstruing the statute.

58. The Minister accepted that the Tribunal must consider all of the matters addressed by sub-reg 1.15A(3). So much was confirmed by the Full Court’s decision in *He v Minister for Immigration and Border Protection* [2017] FCAFC 206.
59. The mandatory considerations related to the consideration of whether a person meets the definition of spouse are relevantly stated in reg 1.15A(3)(a)-(d) inclusive. They are the financial aspects of the parties’ relationship, the nature of their household, the social aspects of their relationship and the nature of the parties’ commitment to one another.

⁵(2013) 85 NSWLR 86, [50].

⁶[1986] HCA 40; 162 CLR 24 at 39-40.

⁷[1998] HCA 28; 194 CLR 355 at [91] - [93].

Each of sub-para's 1.15A(3)(a)-(d) expand upon the nature of the considerations which are to be considered.

60. The applicant's complaint as to the asserted failure to consider parties sexual relationship fell for consideration under the rubric of the nature of the parties' commitment to one another: sub-par 1.15A(3)(d)(i)-(iv). The matters expressly addressed by this sub-paragraph identified the duration of the parties' relationship, the length of time that they had lived together, the degree of companionship and emotional support and whether the parties saw their relationship as a long term one.
61. The need to consider the nature and extent of the parties' sexual relationship is not an express mandatory consideration prescribed by sub-par 1.15A(3)(d)(i)-(iv). It may be an aspect of the need to consider the degree of companionship and emotional support which the parties show to one another; however, on the principles stated in *Peko-Wallsend* and *Lo* it was not a matter which the Tribunal was required to take into account. My attention was directed to *Um v Minister for Immigration* [2005] FMCA 1590 at [19] in which Dowdy FM held that the parties' sexual relations were "*not relevant consideration in the Peko-Wallsend sense.*" I also agree in the Minister's submissions that the Tribunal's reasons, which addressed the parties plans to start a family, implicitly accepted that the parties had or contemplated such relations: cf *Um*, [16].
62. The Tribunal considered the nature of the parties' commitment to each other. In the course of doing so, it considered also the degree of companionship and emotional support that was drawn on by the applicant and her sponsor. It is clear that the Tribunal did not disregard the fact of the parties' relations. It was a matter for the Tribunal to determine the weight that it was to attribute to that issue.
63. To the extent that the Tribunal did not address more fulsomely the extent of the parties' sexual relations, I discern no error in its decision. The Tribunal was well entitled to consider that the parties led quite separate lives the totality of its reasoning in relation to the parties' level of commitment was adequately addressed by its Reasons.
64. Ground 1 is rejected.

Ground 2 - unreasonableness

65. Ground 2 reads:

66. *The AAT made a jurisdictional error by not deciding whether or not the Applicant was a spouse of her sponsor within the meaning of reg 5F of the Regulations reasonably.*

67. 2.1 *The AAT found that the Applicant was a 31 year old female (Paragraph [2] of Reasons).*

68. 2.2 *The AAT found that the Applicant married her sponsor on 18 February 2012 (Paragraph [9] of Reasons).*

69. 2.3 *The AAT noted that there was a substantial age gap of 27 years between the Applicant and her sponsor (Paragraph [10] of Reasons).*

70. 2.4 *At the AAT hearing, the Applicant and her sponsor gave evidence that they had sexual activity, and the Applicant gave evidence that the sexual activity commenced in January 2011.*

71. 2.5 *It was unreasonable for the AAT to find that the Applicant was not a spouse of her sponsor because a young female would not marry and alter her marital status in those circumstances unless they are in a genuine spousal relationship.*

72. The applicant's written submission make clear that Ground 2 rested upon the Tribunal's alleged failure to consider or consider adequately the nature of the parties' sexual relations.

73. For the reasons above, I do not accept the applicant's submissions that the decision of the Tribunal was unreasonable in the requisite sense.

74. The present case is not one in which the complaint is founded upon a failure of refusal to exercise a discretion favourably to the applicant: cf *Minister for Immigration and Citizenship v Li*;⁸ *DAO16 v Minister for Immigration and Border Protection*.⁹ I have examined the Reasons in detail. It was entirely open to the Tribunal on the whole of the evidence to come to the ultimate conclusion that it did. In my opinion

⁸ (2013) 249 CLR 332.

⁹ (2018) 353 ALR 641.

it was not a decision which approached satisfaction of the demanding threshold for a finding of legal unreasonableness.¹⁰

75. Ground 2 is rejected.

Ground 3 – illogicality

76. Ground 3 reads:

77. *The AAT's decision was: (a) so unreasonable that no reasonable Tribunal could have made it; and/or (b) was illogical and irrational.*

78. Particulars

79. 3.1 *The AAT found that the Applicant was a citizen from China (Paragraph [2] of Reasons).*

80. 3.2 *The AAT found that the Applicant's parents were in China (Paragraph [17] of Reasons).*

81. 3.3 *The AAT found that the Applicant was a 31 year old female (Paragraph [2] of Reasons).*

82. 3.4 *The AAT found that the Applicant married her sponsor on 18 February 2012 (Paragraph [9] of Reasons)*

83. 3.5 *The AAT noted that there was a substantial age gap of 27 years between the Applicant and her sponsor (Paragraph [10] of Reasons).*

84. 3.6 *The AAT's decision was unreasonable and/or illogical and irrational because a young female would not leave her home country to move to a new country without her parents, and in circumstances where she has married someone 27 years older than her, unless the spousal relationship was genuine.*

85. The seminal statement of principle respecting irrationality and illogicality in the administrative process of a decision-maker is found in *Minister for Immigration v SZMDS*.¹¹ The test is a stringent one and was stated by Crennan and Bell JJ as follows:¹²

¹⁰ *Li supra*, [113] (Gageler J).

¹¹ (2010) 240 CLR 611.

¹² (2010) 240 CLR 611, [135].

86. *But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion*

87. Later their Honours stated:¹³

88. *Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.*

89. The applicant's written submission expressed Ground 3 in terms related to the Tribunal's apparently being "*influenced by the age gap between my sponsor and I.*" The Tribunal merely touched upon this subject at [11]. It did not do so in a way which ascribed apparent significance to it other than as an objective fact.

90. Ground 3 is accurately characterised as one in which the applicant emphatically disagrees with the decision of the Tribunal. That of itself does not ground jurisdictional error. I see nothing in the reasoning of the Tribunal which would support a conclusion that its decision was illogical or irrational when gauged against the established test.

91. Ground 3 is rejected.

Section 376 certificate

92. The Minister as model litigant drew attention to the fact of the s 376 Certificate and that the Tribunal had decided the merits review of the

¹³ (2010) 240 CLR 611, [135].

application without alluding to that Certificate or the document and information which it contained.

93. For the purposes of Part 5 of the Act, Div 5 contains an exhaustive statement of the natural justice hearing rule in relation to the matters with which it deals: s 357A(1). Within Div 5, ss 359A(1) and 359AA require that a Tribunal must give to an applicant in a way which it considers to be appropriate, clear particulars of any information that it considers would be the reason or a part of the reason for affirming the decision under review. In turn, where the Tribunal is to conduct a hearing before making a decision by way of review, it must invite an applicant to such hearing: s 360A. In doing so it must afford the applicant an opportunity to give evidence and present arguments on the issues arising on the decision under review: s 360(1). It is settled that an applicant so invited to a hearing is entitled to a real and meaningful opportunity to give evidence and present arguments on those issues.
94. In the present case, the Certificate was valid on its face. Sub-section 376(3) confers a residual discretion on the Tribunal to disclose matter the subject of a certificate under s 376 to an applicant. For that reason, it may be that an applicant is to be afforded an opportunity to raise submissions or give evidence in relation to the existence of the Certificate and perhaps the information contained in the document to which it relates.
95. In the present case, the relevant document and thus information it contained were provided to the applicant's lawyers some two weeks before the hearing in this court. The fact that the document was so provided is also to be considered in the context that the Minister's written submissions were served on those lawyers on 12 November 2018.
96. No argument or submission was made by the applicant, whether in her written or oral submissions raising objection to the information in that document or to the manner of the Tribunal's conduct of the matter in failing to disclose the existence of that information to her.
97. It was accepted that the Minister bore the onus of establishing that the existence of the Certificate and the information contained in the single document within the relevant folio of the Department's file was

immaterial to the Tribunal's decision and could have made no difference to the result of her application: *Minister for Immigration and Border Protection v CQZ15*.¹⁴

98. I have examined the document in question and accept the submission that the information it contained could have made no difference to the result of this application. The information related to the travel undertaken by the applicant's spouse in the period from July 1990. The information revealed by that document was plainly overtaken by the evidence which the spouse gave as to his travel movements. I agree that the applicant suffered no disadvantage by reason of non-disclosure of the Certificate or the information contained in the subject document: *DDN16 v Minister for Immigration and Border Protection*.¹⁵

Conclusion

99. As the applicant was self-represented before me, I have considered the materials in the court book and the Reasons of the Tribunal. As I have rejected each ground of review and consider that no other ground is revealed by those materials or Reasons, the application is dismissed.

I certify that the preceding seventy-eight (78) paragraphs are a true copy of the reasons for judgment of Judge A Kelly

Associate:

Date: 27 November 2018

¹⁴ [2017] FCAFC 194, [72]-[73].

¹⁵ [2018] FCA 1697, [37] and cases cited (Robertson J).